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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

TWIN CITY POWER COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the court of appeals (R. 138–148) is reported at 215 F. 2d 592. The opinion of the district court, filed October 1, 1949 (R. 1–14), is reported at 86 F. Supp. 467. The report of the commissioners to the district court (R. 14–47) is not reported. The district court's decree confirming the report of the commissioners (R. 47–55) is reported at 114 F. Supp. 719. Its order overruling objections to the decree (R. 55–58) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1954 (R. 153). The peti-

tion for a writ of certiorari was filed on November 26, 1954, and was granted on January 10, 1955 (R. 154). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

When the United States, exercising the power of eminent domain, condemns land on a navigable river for a project in aid of navigation, is the condemnee entitled to receive, as an element of just compensation for "private property" taken, a special increment based upon the land's adaptability to use as a site for hydroelectric power operations?

STATUTE INVOLVED

The Act of December 22, 1944, c. 665, 58 Stat. 887, provides in pertinent part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the considera-

tion of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

* * * * *

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein * * *.

* * * * *

SAVANNAH RIVER BASIN

The general plan for the comprehensive development of the Savannah River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, second session, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Caro-

lina and Georgia, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $35,300,000.

STATEMENT

The essential facts are undisputed and may be summarized as follows:

1. *The Clark Hill Project.*—The Savannah River is one of the most important navigable streams in the southeastern United States. Suggestions and proposals have been made from time to time for the improvement of the river basin. The upshot was House Document No. 657, 78th Congress, 2d sess., in which the Chief of Army Engineers recommended a comprehensive plan for improvement of the basin, involving, *inter alia,* the ultimate erection of some 11 dams. Construction of the Clark Hill Dam and Reservoir in South Carolina and Georgia, a short distance above Augusta, Georgia, for the combined purposes of navigation, flood control and water power development was recommended as the first step.

Congress approved the comprehensive plan and authorized the construction of Clark Hill dam as a multiple purpose project. Flood Control Act of 1944, *supra,* pp. 2–4. See *Chapman* v. *Federal Power Comm'n,* 345 U. S. 153. The approved plans contemplate that the Clark Hill project (upon which work has been proceeding)

will promote commerce by making available, at all times a minimum channel depth of seven feet between Augusta, Georgia, and the mouth of the Savannah River (H. Doc. 657, *supra*, pp. 9–10). This improvement of the channel, it was estimated, would result in an annual saving of $186,000 on commerce and $15,000 on channel maintenance (*id*, pp. 63, 66–67). Clark Hill dam, it was further determined, would yield such substantial benefits from the standpoint of flood control as to justify allocation of $364,000 of initial cost to that function (*id*, pp. 38, 66–67). Other navigation benefits of the project will be reduction of maintenance dredging in Savannah harbor and reduction of upstream penetration of salt water (*id*, pp. 65–66).

The Hartwell project, the next site in line under the comprehensive plan, was authorized by the Flood Control Act of 1950, 64 Stat. 163, 170, 171. The River and Harbor Act of 1950, 64 Stat. 163, 165, modified the original plan for assuring a seven-foot channel below Augusta, Georgia, so as to provide a channel nine feet deep and 90 feet wide. See S. Doc. 6, 81st Cong., 1st Sess. Accomplishment of this objective depends upon regulation of the stream flow by means of the Clark Hill dam. S. Doc. 6, *supra*, pp. 2, 5, 16.

2. *The lands involved and their history.*—Respondent Twin City Power Company is a family holding company owning lands in South Carolina.

Its wholly owned subsidiary, Twin City Power Company of Georgia, owns property across the river in Georgia.[1]

The lands of the Twin City companies, taken for purposes of the project, lie on both sides of the Savannah River, extending upstream for some 11 miles from a place known as Price's Island. Involved are some 4,519 acres which Twin City owned in fee and another 188 acres over which it had flowage easements (R. 21). These lands had been acquired between 1901 and 1910 but at the time of taking were substantially vacant (R. 24). Very little was used for farming and there were no improved roads, no utility lines, no railroads, no bridges, no buildings and practically no improvements of any nature (R. 24, 49, 56, 85, 93–94).

The lands were originally acquired for the purpose of constructing a hydroelectric power project. It was later contemplated that they might be sold to Savannah River Electric Company or

[1] The Georgia lands are not directly involved in the judgments entered in this case, although the valuation of those lands presents identical issues which are raised by the Government's pending petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *United States* v. *Twin City Power Company of Georgia*, October Term 1955, No. 209. For purposes of setting forth the history of the controversy, it is convenient to treat the lands of the two companies as a unit and to refer to both companies as Twin City. We shall also indicate, in annotations to the remainder of the Statement, the parallel courses of the South Carolina and the Georgia litigation.

some other private corporation for use in such a project (R. 22, 23–24). Between 1901 and 1919 Congress passed six special acts granting Twin City permits of limited duration for construction of a dam at Price's Island.[2] Although preliminary surveys were made and a two and one-half mile railroad siding was built, no dam construction was undertaken by the time the last authorization expired in February 1922, and in 1937 the rails of the siding were sold as scrap. In 1925 Twin City sought a permanent license under the Federal Power Act, claiming that part of that Act was unconstitutional. At the same time Savannah River Electric Company applied for a permit for a project which would have absorbed Twin City's lands. Such a license was granted in 1928 but was surrendered in 1932 and nothing further appears to have been done by either company until many years later (R. 23, 54, 57).

Various federal agencies, including the Army Engineers, the Federal Power Commission, the Department of the Interior and a special board established by the President in 1936, reported upon the advisability of a federal project at Clark Hill and such a project was advocated both by local interests, public and private, and by the legislatures of the States of South Carolina

[2] These were the Acts of February 8, 1901, 31 Stat. 763; February 27, 1907, 34 Stat. 1000; February 29, 1908, 35 Stat. 36; June 3, 1912, 37 Stat. 120; March 1, 1916, 39 Stat. 34; February 28, 1919, 40 Stat. 1212.

and Georgia. See summary of these reports and recommendations in H. Doc. 657, *supra*, pp. 11–13, 31.

After World War II Savannah River Electric Company applied to the Federal Power Commission for a license for a project almost identical with Clark Hill, and Twin City negotiated with it, as well as with other companies, for the sale of its properties (R. 23). Savannah's application was denied on the ground that the federal government was undertaking the project, and the Commission's decision was sustained in the courts. *Savannah River Electric Co. v. Federal Power Comm'n.*, 164 F. 2d 408 (C. A. 4). Sale negotiations by Twin City were discontinued when it became evident that no private project would be licensed (R. 23).

3. *The proceedings below.*—The condemnation proceedings out of which this case arises were instituted between 1947 and 1950 in the United States District Court for the Western District of South Carolina.[3] Savannah River Electric Company, Twin City and Augusta Power Company filed answers claiming value based upon potential use of their lands for water power development. Motions of the Government to strike these allegations on the ground, *inter alia*, that such alleged water power value was not recover-

[3] During the same period, proceedings relating to the Twin City properties in Georgia were instituted in the United States District Court for the Southern District of Georgia.

able were denied, the district court holding (R. 1–14) that *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, and other cases relied upon by the Government were inapplicable and that *United States ex rel. T. V. A.* v. *Powelson*, 138 F. 2d 343 (C. A. 4) and *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, controlled. Thereafter, the question of value of the Twin City lands was submitted to commissioners appointed under Rule 71A (h), Federal Rules of Civil Procedure.[4]

On May 14, 1953, the commissioners filed a lengthy report, evaluating both the South Carolina and Georgia holdings of Twin City. The report finds that Twin City's lands constituted a very good site for a hydroelectric development at Price's Island and that Twin City would have needed to acquire only an additional 400 acres to construct a dam providing a 60-foot head of water (R. 24–25). The report concludes that Twin City was entitled to recover potential water power value, though recognizing, at the same time, that it was "practically certain" that Twin City could not have obtained a license for such a project (R. 26). The report states, in this connection, that the properties had a special value as the site, or part of the site, of a hydroelectric development

[4] The district judge sitting in the companion condemnation cases involving the Twin City properties in Georgia appointed the same commissioners so that a joint proceeding might be conducted.

and that, since they are now under water as part of the Clark Hill development, "it seems specious reasoning to say that these lands had no potential water power value at the time they were taken from Twin City" (R. 35). It declares further that Twin City held enough land, for all practical purposes, to establish a project with a 60-foot head; that the properties would be more valuable if combined with others for a larger power development; and that the "latter course is what the United States has done" (R. 36).

The report notes the opinions of three experts for Twin City who valued the lands for water power purposes, at $1,500,000 to $1,900,000 (R. 37). The principal basis of their estimates was the steam plant comparison method, which capitalizes the annual savings in the cost of producing electric power by water rather than by steam (R. 38). The comparison was made in terms of the annual cost of producing the number of kilowatts which could be derived from the flow and fall of the stream with a 60-foot head of water (R. 39). The report adopts the estimate of one of the Twin City witnesses, making certain modifications based upon the commissioners' conclusion (contrary to the assumption of the witness) that Twin City had no rights in certain acres (R. 38–39). The result was a total valuation (*i. e.*, for the lands in both South Carolina and Georgia) of $1,257,033.20, or $267.02 per acre

(R. 40–41).[5] The award for the South Carolina lands was $471,904.45 (R. 42–43).

At the request of the parties, the commissioners also considered the evidence of land values exclusive of use for water power development. They concluded that the agricultural or wild forest value was $60,293.60, or about $37 an acre, for South Carolina lands and $90,548.25, or about $31 an acre, for Georgia lands, or a total of $150,841.85 (R. 45–46).[6]

Overruling all exceptions, the district court entered a decree confirming the report of the commissioners (R. 47–55). Holding that the allowance of water power value was proper, the court did not pass on the agricultural and timber valuation of the commissioners. A motion by the Government for amended and additional findings and for entry of a new judgment was denied (R. 55–57), and judgments were thereupon entered (R. 58–60).

The Court of Appeals for the Fourth Circuit affirmed, holding that it had been shown that there was a reasonable probability that the various tracts of land acquired by respondent would be used in connection with the development of water power; that use for this purpose was "the

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[5] Lands in which Twin City owned a flowage easement were valued equally with fee properties on the ground that they were equally valuable for water power purposes (R. 41).

[6] For this purpose, the flowage easement lands were excluded from consideration (R. 45).

most profitable use of the land * * * taken"; and that "there is no basis in law or in reason why this element of value should be ignored. The land was acquired by the owner for that purpose; and it is now being acquired by the United States for that purpose" (R. 141). The court stated further that the Government "is taking, not the bed of the stream, but lands adjacent to the stream and is taking them, not for purposes of navigation, but for the primary purposes of flood control and the development of water power" (R. 143). The opinion adds (R. 143, fn.):

> "That the purposes of the taking was not improvement of navigation but flood control and water power development see statement of facts by this court in the Clark Hill case, *Savannah River Elec. Co.* v. *Federal Power Commission*, 4 Cir. 164 F. 2d 408."

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[7] Subsequently, on April 12, 1955, the Court of Appeals for the Fifth Circuit affirmed judgments of the Georgia district court awarding Twin City water power value in connection with the taking of the Georgia lands. *United States* v. *Twin City Power Company of Georgia*, 221 F. 2d 299, certiorari pending, October Term 1955, No. 209. Its opinion expresses full approval of the Fourth Circuit's opinion and explicitly refuses to adopt the Ninth Circuit's views, set forth in *Continental Land Co.* v. *United States*, 88 F. 2d 104, and *Washington Water Power Co.* v. *United States*, 135 F. 2d 541. The opinion declares (p. 300) that the Ninth Circuit's error was in failure "to see and draw the distinction between the taking of the bed of a navigable stream and fast lands adjoining for purposes of navigation and the taking, as here, of fast lands for entirely different purposes." Distinguishing this

SUMMARY OF ARGUMENT

I

The court of appeals held that even though it be assumed that improvement of navigation is the purpose of a river basin project, the United States must pay for the power-site value of riparian lands which it condemns. But such an increment of value is necessarily bottomed on the assumption of availability to the landowner of the bed and waters of a navigable stream. As has been long established, control of the flow of navigable waters is vested in the United States. And cases which "deal with the rights of riparian owners * * * as between each other" must be put to one side when the United States is involved. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70.

The dominant navigation servitude of the United States precludes a riparian owner from

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Court's *Chandler-Dunbar* holding, the Fifth Circuit states that the Clark Hill project was only for the "ostensible purpose * * * [of] improvement of navigation" (p. 302) and that the real purpose was "use by the United States for a water power project" (p. 300).

Since the decision in the instant case, another case involving an assertion of water power value for fast lands abutting a navigable stream has been decided by the Fourth Circuit. The claim was sustained on the basis of the decision now under review. See *United States* v. *2979.72 Acres of Land*, 218 F. 2d 524, certiorari pending *sub nom. United States* v. *Virginia Electric and Power Company*, October Term 1955, No. 41.

asserting against the Government a claim based upon loss of access to a stream consequent upon the Government's erection of a dyke or jetty in front of his property. *Gibson* v. *United States*, 166 U. S. 269. Nor may the riparian owner recover from the sovereign when navigable waters are filled in with materials dredged from other navigable waters, *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, or when the course of a stream is diverted, *South Carolina* v. *Georgia*, 93 U. S. 4. "Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's 'absolute' power, in the interests of commerce, to make necessary changes in a stream." *Commodore Park, supra*, at 391.

These principles have been fully applied to the precise situation presented by the case at bar. In the *Chandler-Dunbar* case, Congress had terminated a revocable license authorizing a riparian owner to maintain works in a navigable river and had authorized the Secretary of War to condemn lands abutting the river. This Court held it inconceivable that "the running water in a great navigable stream is capable of private ownership" (229 U. S. at 69); it rejected an award of compensation for "exclusion from the use of the water power inherent in the falls and rapids" of the stream (p. 59); and it likewise specifically rejected a claim that condemned lands bordering the river were entitled to a special element of

compensation because they could be used in developing water power, stating that "the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland" (p. 76). The principles of *Chandler-Dunbar* have been reaffirmed by this Court and applied by the lower federal courts on a number of occasions. They control this case.

II

The court of appeals held, without explanation, that the Clark Hill project had no specific navigation purpose and that the taking was for "flood control and power development."

The detailed engineering studies approved by Congress show that the project was designed, *inter alia*, to deepen the channel in an important stretch of the river, to improve Savannah harbor and to reduce upstream penetration of salt water. Such a determination by Congress is "entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66. There is no evidence in the record to suggest, no less demonstrate, that these declared purposes are not feasible and will not be achieved.

In addition, the court below seriously erred in assuming that flood control is not fully within the navigation power. A project which minimizes or eliminates the danger that a river will overflow is no less directly related to the promotion

of commerce than a project which widens or deepens the river channel. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 520.

III

The extent of the Government's prerogatives in relation to the control of navigable waters aside, the awards are improper on settled principles of valuation applicable in condemnation proceedings. For some years prior to the authorization of the Clark Hill dam it was "practically certain" (the commissioners' words) that a license to build a dam at the Price's Island site could not be obtained. In these circumstances, the market value of respondent's lands was not enhanced because of physical adaptability for power-site purposes. The condemnor is not required to pay for the frustration of former hopes or expectations.

In effect, the decisions below have made awards based upon the strategic value of the condemned property to the condemnor. It is well-settled that such value must be excluded from consideration.

ARGUMENT

The opinion below states two major propositions. Primarily it holds as follows: When the United States, undertaking a project in aid of navigation, condemns fast lands abutting a navigable stream, it must pay a value which takes

account of the highest and most profitable use for which the property is reasonably adaptable, even though this optimum utilization involves, as a necessary concomitant, harnessing the waters of the navigable stream. More particularly, the Government is obliged, in these circumstances, to pay for the so-called power-site value of the lands. The opinion holds, additionally, that the taking in the instant case was not actually for a project in aid of navigation (the Congressional declaration to the contrary notwithstanding) but was for "flood control and water power development" (R. 143), the implication being that in such circumstances there must, in any event, be compensation for power-site value.

We shall argue (1) that the power-site value of riparian lands is not recoverable from the United States when it exercises its control over navigable streams, and (2) that there is no foundation for the court of appeals' holding, contrary to the express determination of Congress, that the project was not one in aid of navigation. We point out additionally (3) that, even if the Government might be required to pay compensation for its exercise of the exclusive governmental prerogative of controlling navigable streams, respondent's lands had no realizable power-site value on the market and that, on ordinary principles of valuation in condemnation proceedings, the awards were improper.

I

THE SO-CALLED POWER-SITE VALUE OF RIPARIAN LANDS IS NOT RECOVERABLE FROM THE UNITED STATES WHEN THE GOVERNMENT CONDEMNS SUCH LANDS IN THE EXERCISE OF ITS CONTROL OVER NAVIGABLE STREAMS

The court of appeals held that, "even where improvement of navigation is the purpose" (R. 143), the Government must pay for the power-site value of riparian lands which it condemns. We deny that the owner of riparian lands is entitled to assert against the United States an increment of value which is necessarily bottomed on the assumption of availability to private persons of the bed and waters of a navigable stream.[8] The allowance of such a claim derogates from the unqualified right of the United States to control the flow of navigable waters—a right established since the early days of the Republic.

Concededly, the location of lands along a navigable stream and the attendant incidents of riparian ownership may, in some circumstances, make the property valuable for power purposes

[8] The claim of enhanced value asserted by Twin City is squarely rested upon location of the lands "in proximity to and along the Savannah River" (R. 35). Note that the compensation awarded Twin City for the 188 acres in which its rights consisted only of a flowage easement was the same, per acre, as for the lands which it owned in fee, although, as the commissioners recognized, the flowage rights were valueless for purposes other than a river project. See *supra*, p. 11; R. 41.

in transactions between private individuals. *Boom Co.* v. *Patterson*, 98 U. S. 403; *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369. But the United States stands in an entirely different position. As this Court has stated, cases which "deal with the rights of riparian owners upon navigable or non-navigable streams as between each other" may be put to one side when the United States is involved. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *United States* v. *Willow River Power Co.*, 324 U. S. 499.

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725. The United States need not compensate for the effects of such "requisite legislation." Thus the riparian owner cannot recover for the impairment or destruction of access to the stream by the placing of a dyke or jetty in front of his property. *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141. He has no right of recovery against the sovereign when navigable waters are filled in with material dredged from other navigable waters, *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, or when the course of the stream is diverted, *South Carolina* v. *Georgia*, 93 U. S. 4,

10, 11. "Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's 'absolute' power, in the interests of commerce, to make necessary changes in a stream." *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 391. In short, the riparian owner has no "vested right" to use of the adjacent stream and need not be paid for the loss or impairment of access to it.

Early in the history of the development of hydroelectric power, this Court specifically rejected the claim, similarly advanced by a company owning land abutting a navigable stream, that the United States should be required to pay for the water power potentialities of the land. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

In that case, an Act of Congress had revoked the license under which the Chandler-Dunbar Company maintained works in the St. Marys River and had authorized the Secretary of War to condemn property abutting that navigable river. The trial court awarded the company $550,000 as compensation for its "exclusion from the use of the water power inherent in the falls and rapids" of the river (229 U. S. at p. 59). This Court held the allowance erroneous, stating (p. 66) that "the flow of the stream was in no sense private property" and (p. 69) that the very notion "that the running water in a great navigable stream is capable of private ownership is inconceivable."

Of particular pertinence is the fact that the

trial court had also assigned special compensation to land bordering the river, on the ground that it could have been used in developing power therefrom. This Court sustained the Government's exceptions to this portion of the award, stating (pp. 75–76):

> These exceptions so far as they complain of the additional value to be attached to these parcels for use as factory sites in connection with the development of horse power by the Chandler-Dunbar Company, must be sustained. These "additional" values were based upon the erroneous hypothesis that that company had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable, by some extension of their works already in the river, of producing 6,500 horse power.
>
> Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river [pp. 66, 69], *the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland.* The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical addi-

> tional value to a riparian owner who had no right to appropriate the current to his own commercial use. *These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact.* [Emphasis added.]

In short, this Court held, more than forty years ago, that a riparian owner has no property right, as against the United States, in the power potential of a navigable river and that accordingly he cannot assert against the Government an element of land value predicated upon the suitability of his property for use in developing water power.[9]

Since *Chandler-Dunbar*, the principle has been

[9] Congress and the Chief Executive have long proceeded from the premise that the water power of navigable streams constitutes a national asset, to be administered as such. This position was forcibly expressed by President Theodore Roosevelt during a period when hydroelectric power was assuming large importance in the national economy. See, for example, the 1908 Veto Message Relating to Extension of Time for Construction of Dam Across Rainy River (S. Doc. No. 438, 60th Cong., 1st sess., p. 3) and the 1909 Veto Message Relating to the Building of a Dam Across the James River, Stone County, Missouri (H. Doc. No. 1350, 60th Cong., 2d sess., pp. 5–6). And see discussion in *Chapman* v. *Federal Power Comm'n*, 345 U. S. 153, 167. It has provided the basis upon which legislative matters relating to the development of water power have been considered since approximately the same time. See, for example, H. Rep. No. 842, 63d Cong., 2d sess., p. 10; S. Rep. No. 66, 64th Cong., 1st sess., p. 17; Water Power Hearings, House Committee on Water Power, 65th Cong., 2d sess. (1919 Printing), pp. 8–9, 39, 81; and 56 Cong. Rec. 9037–9038, 9047, 9301–9302, 9303, 9311, 9314.

reaffirmed by this Court and applied by the lower courts on several occasions.

In *United States* v. *Appalachian Power Co.*, 311 U. S. 377, the Court had occasion to consider the constitutionality of the recapture section of the Federal Power Act (Section 14), which provides in substance that upon expiration of a water power license the United States may take over the project by paying the licensee's "net investment" as defined in the Act. At the outset of its discussion, the Court emphasized (p. 424) that the "Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property. * * *. Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion." Addressing itself particularly to the claim that the Act would permit recapture at less than "fair value", the Court stated (p. 427) that the flow of the stream "has no assessable value to the riparian owner. . If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power."

In *United States* v. *Willow River Power Co.*, 324 U. S. 499, respondent company was the owner of a dam and hydroelectric plant located near the confluence of the Willow and St. Croix Rivers. Downstream navigation improvements on the St. Croix, undertaken by the United States, altered

the level of the river and brought about a reduction in the generating capacity of respondent's plant. Reversing a judgment awarding damages, this Court, citing its *Chandler-Dunbar* and *Appalachian Power* decisions, held (p. 509) that "a strategic position for the development of power does not give rise to right to maintain it as against interference by the United States in aid of navigation." See also *United States* v. *Commodore Park*, 324 U. S. 386, 391; *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 250.

The identical type of claim advanced in the instant case was made in two cases arising in the Ninth Circuit following Congressional authorization of the Grand Coulee project on the Columbia River. *Continental Land Co.* v. *United States*, 88 F. 2d 104, certiorari denied, 302 U. S. 715; *Washington Water Power Co.* v. *United States*, 135 F. 2d 541, certiorari denied, 320 U. S. 747. The owners of riparian lands asserted in each instance that property condemned by the Government had enhanced value because of "inherent adaptability * * * for 'use in the development of electric power'" (*Continental Land, supra*, p. 109). The court of appeals held, however, that the prospect of the land's use in connection with the development of water power was a claim "based upon something which is not possessed" (*id.*, p. 110), and that "since a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent

therein as against the United States, such riparian owner may not recover for the alleged power-site value of the riparian lands" (*Washington Water Power, supra*, p. 543). *Chandler-Dunbar*, it declared, was "decisive" (*Continental Land*, p. 110). To the same effect see *United States* v. *West Virginia Power Co.*, 56 F. Supp. 298 (S. D. W. Va.). See also *United States* v. *Cox*, 190 F. 2d 293 (C. A. 10), certiorari denied, 342 U. S. 867; *Iriarte* v. *United States*, 157 F. 2d 105, 110 (C. A. 1).

The trial court here regarded the decision in *United States ex rel. T. V. A.* v. *Powelson*, 138 F. 2d 343, certiorari denied, 321 U. S. 773, as controlling (R. 4), and also found support for its holding in *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359. The cases are not strictly in point here since both involved non-navigable streams. But, more important, no retreat by this Court from the *Chandler-Dunbar* principle can be deduced from them. When the *Powelson* case was before this Court, it was found unnecessary to consider whether the *Chandler-Dunbar* rule applied to lands abutting a non-navigable stream because the claimed water-power value of the lands was rejected for independent reasons. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266.[10] The *Grand-Hydro* case arose

[10] Of course, the denial of the Government's petition for a writ of certiorari from the court of appeals' subsequent decision in the *Powelson* case may not be construed as a rejection of the *Chandler-Dunbar* rule.

between two private corporations and this Court's opinion noted (335 U. S. at 373), that "[i]f either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it [Grand-Hydro] might face different considerations from those stated above. The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case. It is not asserting its right to condemn this land."

The court of appeals similarly overlooked the important distinction between the position of the United States *vis-a-vis* the owner of lands abutting a navigable stream and the rights and obligations, *inter sese*, of private owners of riparian lands. Thus it reasoned that if Savanah River Electric Company had been licensed to construct the Clark Hill project it would have been required to pay Twin City water power value,[11] and hence "[w]hen the government takes over the project, there is no reason in law, in justice or in common honesty why it should not pay

[11] Whether Savannah River Electric Company could have been required to pay power value to Twin City if it had received a license from the Federal Power Commission and had brought condemnation proceedings in exercise of the authority thereby granted is the same question which this Court expressly left open in *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373.

compensation on the same basis" (R. 148).[12] The full answer is that "[w]hatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all." *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510. "Respondent's property was always subject to a dominant servitude" (*United States* v. *Commodore Park*, 324 U. S. 386, 391), and for that reason its fair market value could never be enhanced, as against the Government, by its proximity to the navigable stream.

The court of appeals also relied upon an aspect of the *Chandler-Dunbar* decision not yet discussed—the holding that the suitability of certain tracts for the building of a lock and canal was an element of value for which compensation should be paid (229 U. S. at 76–77). It is to be noted that these parcels of upland were to be used for establishing a canal route "around the stream" so

[12] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, cited by the court below (R. 144, 148), "rested primarily upon the doctrine of estoppel, as this Court has in several cases since pointed out." *Omnia Co.* v. *United States*, 261 U. S. 502, 513–514; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 282, fn. 12.

as to enable watercraft to avoid "the falls and rapids in the river" (pp. 66–67). The maintenance of such a canal on the upland was nowise dependent upon the power potential of the St. Marys River. Accordingly, the award based upon the land's utility for canal purposes was in no sense predicated upon the notion that the riparian owner or any private person can have a property interest in the flow of the stream—a concept which this Court rejected in the most emphatic terms. It is that notion which is the vice of respondent's claim here. Twin City's assertion that it has been deprived of a property interest, denominated "power site value" or "water power value," necessarily subsumes a private property interest in the flow of the river, *i. e.*, that someone other than the Government has a right to harness the potential of a navigable stream. That premise is not permissible in the face of the United States' unqualified assertion of its dominant servitude in the stream. In this Court's words, the riparian owner is precluded from asserting against the United States "an element of value which did not inhere in the[se] parcels as upland. The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." 229 U. S. at 76.[13]

[13] *United States* v. *Kansas City Insurance Company*, 339 U. S. 799, upon which the court of appeals also relied (R. 144–

II

CONSTRUCTION OF THE CLARK HILL PROJECT WAS A PROPER EXERCISE OF THE FEDERAL NAVIGATION POWER

The Clark Hill project on the Savannah River was one of a number of comprehensive river basin projects authorized by the Flood Control Act of 1944 (*supra*, pp. 3–4). The express purpose of that Act was to authorize "works of improvement, for navigation or flood control" (*ibid.*). The history of the legislation, this Court has observed, shows "the manifest reluctance of Congress to enter upon power projects having no flood-control or navigational benefits." *Chapman v. Federal Power Comm'n*, 345 U. S. 153, 170.[14]

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145), did not involve a use of the stream for power purposes. The case held merely that the destruction of the agricultural value of land by subterranean seepage of water constituted a taking of the land within the Fifth Amendment. Indeed, the Court observed that "[l]oss of access to a navigable stream is not compensable" and that "change in the flow of a navigable stream does not deprive the private user of that stream, for power purposes, of a compensable right" (p. 805, fn.).

[14] The *Chapman* case involved the question whether Congressional approval of a comprehensive plan for the development of the Roanoke River Basin precluded the subsequent licensing of a hydroelectric plant at Roanoke Rapids. We note parenthetically that the Buggs Island project on the Roanoke River discussed in that case (now known as the John H. Kerr project) is the project involved in *United States v. Virginia Electric & Power Co.*, No. 41, this Term. As mentioned above (p. 13, note 7, *supra*), in No. 41, as in the instant case, the Court of Appeals for the Fourth Circuit awarded power-site value to the condemnees.

As stated above (pp. 4–5, *supra*), Congressional approval of the Clark Hill dam was based upon detailed engineering studies submitted by the Chief of Army Engineers. A specific purpose was to improve minimum channel depth between Augusta, Georgia, and the mouth of the Savannah River—an achievement which would result in an estimated annual saving of approximately $200,000.[15] It was also determined that the project would have the additional effect of reducing maintenance dredging in Savannah Harbor and undesirable upstream penetration of salt water. Congress further determined that the project would yield substantial benefits from the standpoint of flood control.

The court of appeals has brushed aside the determination of Congress and has held that there is no navigation purpose. It has recognized that flood control is a purpose of the project but it apparently deems the achievement of that objective as not falling within the navigation power. In both respects, we submit, it has seriously erred.

The decision of Congress that property shall be condemned for a particular public purpose "is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 552. The

[15] As also indicated above (p. 5), Congress, in 1950, authorized additional measures to increase minimum channel depth still further and to widen the channel.

fact that other purposes may also be served is immaterial. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534. The courts will not undertake to assay the relative importance which various purposes assumed in the mind of Congress, *ibid.*; nor may they assume that Congress will subsequently act in such a manner as to frustrate a declared purpose, *Arizona* v. *California*, 283 U. S. 423, 456–457. The role of the judiciary in determining whether the power of eminent domain is being exercised for a particular purpose is thus "an extremely narrow one." *Berman v. Parker*, 348 U. S. 26, 32.

There is no evidence in this record to suggest that the specific, declared navigation purposes of the project are not feasible or that they will not in fact be achieved. The court below referred to no evidence on this subject but stated in a footnote to its opinion (R. 143): "That the purposes of the taking was not improvement of navigation but flood control and water power development, see statement of facts by this court in the Clark Hill case, *Savannah River Elec. Co. v. Federal Power Commission*, 4 Cir. 164 F. 2d 408." The opinion in the cited case (a case holding that the Federal Power Commission acted entirely within its discretion in denying a license to the Savannah Company after Congress had determined that the project should be a public one) contains a statement of the flood control aspects of the Savannah River Basin project as shown in the leg-

islative history. It makes no reference to the question whether the project will also serve navigation in the specific sense that it will directly improve the normal operating conditions on the waterway. The court of appeals' failure to discuss, in a prior case, a matter not necessary to decision (and one evidenced, incidentally, by the same legislative documents upon which it relied) can scarcely serve to buttress its conclusion in the instant case—wholly without foundation in this record—that one of the declared purposes of Congress was ostensible rather than real.

Since there is no record basis for impugning the Congressional declaration or showing that the declared purpose is impossible of achievement, we submit that the argument that a specific navigation purpose is lacking is not open to respondent. Respondent states in its brief in opposition (p. 9, fn.) that since the dam at Clark Hill is "without locks" there is "no real navigation improvement."[16] But the declared purpose was

[16] The court below made no reference to this argument but it was accepted by the Fifth Circuit in the companion *Twin City* case. That court stated (*United States* v. *Twin City Power Co.*, 221 F. 2d 299, 302): "Navigation has been eliminated by a solid dam, and a power house has been built to devote the entire flow of the Savannah River to the production of hydro-electric power." Indeed, the holding that there was no specific navigation purpose appears to have been decisive for the Fifth Circuit. While that court stated its full agreement with the Fourth Circuit's opinion in the instant case, it nonetheless conceded (p. 300) that if the taking of the fast lands was "for the improvement of navigation" *Chandler-Dunbar* would control. That proposition is the burden of our Point I above.

to improve downstream navigation on the important stretch of river between Augusta, Georgia, and the mouth of the Savannah. There is, of course, no question of the "power to block navigation at one place to foster it at another." *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 392–393. Respondent also suggests (Br. in Op., p. 9, fn.), significantly without record reference or support, that the water stored by the dam will be released in such a manner that it will adversely affect, rather than improve, downstream navigation. The argument finds its counterpart in *Arizona* v. *California*, 283 U. S. 423, 456–457, in which the contention was answered as follows: "This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose." Indeed, in the instant case, Congress has demonstrated its continued adherence to the purpose originally declared. See references to the Hartwell project, p. 5, *supra*.

Entirely apart from the fact that there is no foundation for the court of appeals' rejection of the Congressional determination that the project will improve the waterway itself, the court seriously erred in assuming that a project which will aid in the control of floods (a purpose which the court conceded would be served) is not one within the navigation power. "In truth the authority of the United States is the regulation of com-

merce on its waters. Navigability, in the sense just stated [operation of boats and improvement of the waterway itself] is but a part of the whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426. In addition to the more far-reaching damage which they may threaten or cause, river floods, of course, constitute a most direct and immediate hazard not only to traffic upon the waterways but to traffic which must cross them. See discussion in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 520. Plainly, a project which minimizes or eliminates the danger that a river will overflow is no less directly related to the promotion of commerce than a project which widens or deepens the river channel.[17] Thus the court of appeals' recognition that one of the purposes of the Clark Hill project is flood control (a purpose shown by the same legislative documents which show the specific waterway-improvement purpose discussed above) is at war

[17] In recent years flood control has become of such major importance that Congress has come to treat flood control projects separately from "navigation projects" in the narrow sense of the term, the latter being treated in Rivers and Harbors bills. In the 78th Congress, proposed authorization of the Clark Hill project originally appeared both in the Rivers and Harbors bill and the Flood Control bill. See H. Rep. No. 2051, 78th Cong., 2d sess. Both types of projects represent aspects of the broad federal control over navigable streams.

with its conclusion that the project is not to be deemed one in aid of navigation.[18]

III

THE SO-CALLED POWER-SITE VALUE OF RESPONDENT'S LANDS COULD NOT HAVE BEEN REALIZED IN THE MARKET AT THE TIME OF TAKING AND HENCE WAS AN IMPROPER BASIS FOR THE CONDEMNATION AWARD

As argued above, when the Government properly exercises its prerogatives in relation to the navigable waters of the United States (as it has done here in undertaking the Clark Hill dam), it may not be required to pay a claim of value resting ultimately upon the notion that it might have chosen, instead, to delegate its authority to a licensee. In no event need it pay for that which falls within its exclusive prerogatives, duly exercised. It is unnecessary to go further. But it may be helpful to point out that other settled principles of the law of eminent domain, properly applied to the facts of this case, would also lead to the conclusion that there was no basis for the awards made.

At the time of taking, respondent's lands were largely vacant, being used for the growing of timber. Their value for such use and allied agri-

[18] In light of the above discussion, it is apparent that it is entirely unnecessary to reach the question whether a different result would be justified in the event that the *sole* purpose of the project was the development of hydroelectric power.

cultural purposes was only $37 per acre (R. 45). A condemnee's compensation is, of course, to be measured by market value. And, in the process of determining that value, the condemnee is not limited to consideration of the use to which he is putting the land. There may be considered, so far as it affects market value, "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future * * *." *Olson* v. *United States*, 292 U. S. 246, 255. But "physical adaptability alone cannot be deemed to affect market value. * * * Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration * * *." Id., pp. 256, 257.

Plainly, then, consideration cannot be given to a use which is impossible or illegal. Yet that is the result of the decisions below. A water power project could be constructed only after issuance of a license by the Federal Power Commission. There was no prospect that a license for a dam at Price's Island would be issued after the mutually exclusive Clark Hill dam was authorized in 1944. And it is perfectly clear that long prior thereto no such private development would have been authorized. In 1939 the Federal Power Commission "strongly endorsed the Clark Hill

project and recommended its early construction." H. Doc. 657, p. 7.[19] Neither respondent nor Savannah Electric Company had taken advantage of licenses earlier received and all such authorizations relating to the Price's Island site had expired by 1932. See *supra*, p. 7. Thus, at least by 1939, if not considerably earlier, it was evident that the necessary license could not be obtained (see R. 26). And obviously the lands could have no market value for water power purposes absent such a license. As the Commissioners' report put it (R. 23); "but, of course, when it became evident that no privately financial [sic] project could be licensed on the Savannah River * * * negotiations were discontinued." In short, at the time of taking, the alleged water power value could not have been realized. The "highest and best use" doctrine does not warrant compensation for the frustration of former hopes or expectations. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 280–282.

The commissioners reasoned, however, that while it was "practically certain that [Twin City] could not have obtained a license" in recent years (R. 26), this did not take from the company's holdings "their potential water power

[19] Sec. 7 (b) of the Federal Power Act, 16 U. S. C. 800, provides that when the Commission concludes that the development of any water resources shall be undertaken by the United States itself it "shall not approve any application for any project affecting such development."

value" (*ibid.*). In essence, it was the commissioners' view that Twin City was entitled to recover the strategic value of the lands *to the condemnor*. This is further reflected in its observation (R. 35) that in view of the fact that the Twin City lands are now under water as a result of the Clark Hill development "it seems specious reasoning to say that [they] had no potential water power value at the time they were taken from Twin City." Similarly, the district court stated (R. 57) that "the Government, having been attracted to the acquisition of this property because of its suitability for water power development, can hardly deny that the water power potential actually did affect its value in the market." And the court of appeals reasoned that, while the adjacent owner did not own the water power value of the current of the river, neither did the Government own the fast lands which also were required for the project (R. 145).

Again, one finds a close parallel in *Chandler-Dunbar*. The district court had held in that case that a particular island having strategic value because it was needed as a tail race site for a project on the St. Marys River should be accorded special compensation. Upsetting the award, this Court made plain that value to the condemnor is not the test. It stated (229 U. S. at pp. 80–81):

> This allowance has no solid basis upon which it may stand. That the property

> may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. * * *
>
> The "Strategic Value" for which $15,000 has been allowed is altogether speculative. It is based not upon the actual market value for all reasonable uses and demands, but *the possible worth of the property to the Government.*
>
> A "strategic value" might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse as the price suited. *But in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion.* The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes. * * * [Emphasis added.]

The doctrine that special value to the Government must be excluded from consideration has been applied, of course, in a wide variety of contexts. See, *e. g., United States* v. *Miller,* 317 U. S. 369, 375; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377; *United States* v. *Cors,* 337 U. S.

325, 333; *McGovern* v. *New York*, 229 U. S. 363; *United States* v. *Catlin*, 204 F. 2d 661 (C. A. 7); *United States* v. *Rayno*, 136 F. 2d 376 (C. A. 1); *United States* v. *Foster*, 131 F. 2d 3 (C. A. 8). Yet, the special awards here are premised not upon realizable market value but rest upon the consideration that the Government needed strategically located riparian lands for accomplishment of a river basin project undertaken by the United States in the exercise of its prerogatives and, by the same token, foreclosed to all others.[20]

CONCLUSION

The judgments should be reversed and the cause remanded with directions to exclude from the awards the element of compensation predicated upon so-called power-site value.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
Attorney.

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[20] A further example of the failure of the courts below to exclude from consideration the special needs or plans of the Government appears from the fact that the valuation was based upon a potential use not only for a power development at Price's Island but also as "an integral part of a larger

power development" (R. 27, 35). The commission ruled that respondent held enough real estate for a project at Price's Island and (R. 36) "these properties would probably be more valuable, for hydroelectric purposes, if combined with other properties for the establishment of a larger power development. The latter course is what the United States has done, in constructing and establishing the Clark Hill Power Project and its necessary storage reservoir." See also the opinions of the district court (R. 49, 50–51, 56) and the court of appeals (R. 140, 141). But the commissioners' report did not even suggest that private enterprise, with or without the power of eminent domain, could have assembled the necessary lands for the larger project.

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